RECORD
AND
BRIEF

No. 16-341

IN THE

Supreme Court of the United States

TC HEARTLAND LLC,

Petitioner,

v.

KRAFT FOOD BRANDS GROUP LLC,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF OF INTEL CORPORATION AND DELL INC. AS AMICI CURIAE IN SUPPORT OF PETITIONER

MATTHEW HULT
INTEL CORPORATION
2200 Mission College Blvd.
Santa Clara, California 95054
(408) 765-3749

Counsel for Amicus Curiae Intel Corporation

KRISHNENDU GUPTA
DELL INC.
176 South Street
Hopkinton, MA 01748
(508) 293-6654

Counsel for Amicus Curiae Dell Inc.

DONALD B. VERRILLI JR.
Counsel of Record
CHAD GOLDER
MUNGER, TOLLES & OLSON LLP
1155 F. Street, NW. 7th Floor
Washington, D.C. 20004
(202) 220-1100
donald.verrilli@mto.com

JORDAN D. SEGALL
MUNGER, TOLLES & OLSON LLP
355 S. Grand Ave., 35th Floor
Los Angeles, California 90071
(213) 683-9208

Counsel for Amicus Curiae Intel Corporation

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

of Congress

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INTEREST OF AMICI CURIAE[1]

As two of the world's leading technological innovators, amici curiae Intel Corporation and Dell Inc. share a substantial interest in restoring Congress's intended interpretation of the patent venue statute to promote the fair, efficient, and predictable resolution of infringement suits and curb the abuses caused by overbroad venue.

Silicon Valley-based Intel Corporation is the world's largest semiconductor manufacturer, as well as a leading manufacturer of hardware and software products for networking, telecommunications, cloud computing, and other applications. Intel's chips power a large percentage of the world's computers, from everyday desktops and laptops to the servers that form the backbone of the modern digital economy.

Dell Inc. and EMC Corporation recently merged, creating a new, combined company, referred to hereinafter as Dell. The combined entity, one of the world's largest technology companies, sells a full spectrum of products, software, and services, including personal computers, servers, enterprise storage systems and software, and computer and network security products. Dell also offers strong capabilities in the fastest-

[1] Pursuant to Supreme Court Rule 37.6, counsel for amici curiae state that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party, or any other person other than amici curiae or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented in writing to the filing of this brief.

growing areas of the industry, including cloud technology and services, software-defined data center, converged infrastructure, platform-as-a-service, managed information technology services, data analytics, mobility, and cybersecurity.

Intel and Dell each own tens of thousands of patents and acquire more all the time; Intel routinely places in the top ten annually in number of patents granted by the U.S. Patent and Trademark Office. Neither Intel nor Dell is a stranger to patent litigation. While both companies have defended their innovations as patent-litigation plaintiffs in the past, over the last fifteen years Intel and Dell's experience—like that of many technology companies—overwhelmingly has been as defendants in suits brought by increasingly sophisticated non-practicing entities seeking return on litigation as a portfolio investment strategy.

Intel is incorporated in Delaware and headquartered in Northern California. Dell is a Delaware corporation headquartered in Round Rock, Texas. Its enterprise storage division, Dell EMC, is headquartered in Hopkinton, Massachusetts, as was its predecessor, EMC Corporation. Both companies have long litigated infringement suits in their home districts. Since the Federal Circuit radically expanded patent venue in 1990, however, both companies have faced a disproportionate number of patent suits in judicial districts with no connection to their allegedly infringing activities beyond the bare fact that they have sold products there.

Intel and Dell distribute their products nationwide. Under the prevailing rule, venue may therefore be had in any of the country's 94 judicial districts. Currently,

the Eastern District of Texas is the forum of choice for patent plaintiffs: in the last two years alone, Intel has been sued there for infringement eleven times and Dell over two dozen times. But at any time, a new district could become favored by so-called "patent trolls" and their counsel, and Intel and Dell could find themselves defending multiple suits in a different corner of the country without any material change in their manufacturing or sales practices. Amici believe that this type of venue shopping is a contemporary form of the "abuses" that Congress intended to stamp out by enacting the patent venue statute. *Schnell* v. *Peter Eckrich & Sons, Inc.*, 365 U.S. 260, 262 (1961).

Amici are supporting petitioner before this Court because they have been convinced by long experience that Congress struck a wise and necessary balance when it enacted 28 U.S.C. 1400(b). Nothing about returning to Congress's reasoned judgment in this regard will hinder innovation or prevent legitimate patent litigation disputes from being adequately heard and resolved.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This case presents an issue of pressing importance to the sound administration of the nation's patent laws. In particular, this case offers the Court an opportunity to correct the Federal Circuit's erroneous decision in *VE Holding Corp.* v. *Johnson Glass Appliance Co.*, 917 F.2d 1574 (Fed. Cir. 1990), that patent cases would no longer be governed by the longstanding narrow venue standard that Congress had crafted to account for the particular characteristics of patent

litigation, but would henceforth be governed by generally applicable venue standards. *VE Holding* failed to accord proper respect to this Court's precedents and gave short shrift to vital interpretive principles, like *stare decisis* and the presumption against implied repeals, that ensure stability in our legal system. That decision, which has proven to be the source of great mischief in the field of patent litigation, was wrong when it was made and remains wrong today. Reversing the Federal Circuit will rectify a manifest legal error and promote the sensible policies Congress sought to achieve through the special patent venue statute.

I. Since 1897, Congress has prescribed a specific standard to govern venue in patent cases. Under that standard (currently set forth at 28 U.S.C. 1400(b)), a corporate defendant is subject to suit in its State of incorporation or in any State in which it commits an act of infringement and maintains a regular place of business. As this Court has recognized, the limited venue statute "confers upon defendants in patent cases a privilege in respect of the places in which suits may be maintained against them." *General Elec. Co.* v. *Marvel Rare Metals Co.*, 287 U.S. 430, 434-435 (1932) (*Marvel*).

In *Fourco Glass Co.* v. *Transmirra Products Corp.*, this Court held that Section 1400(b) is "the sole and exclusive provision controlling venue in patent infringement actions." 353 U.S. 222, 229 (1957). In *Fourco*, the Court answered the very question the Federal Circuit faced below: "whether § 1391(c)"—the general venue statute—"supplements § 1400(b), or, in other words, whether the latter is complete, independent, and alone controlling in its sphere." *Id.* at 228.

The Court reaffirmed its earlier holding that Congress did not intend the patent venue statute "to dovetail with the general provisions relating to the venue of civil suits." *Id.* at 225 (quoting *Stonite Prods. Co.* v. *Melvin Lloyd Co.*, 315 U.S. 561, 566 (1942)). Rather, Congress intended from the passage of the first patent venue statute in 1897 to "define the exact limits of venue in patent infringement suits" without reference to any other federal statute. *Stonite*, 315 U.S. at 566.

In its decision in *VE Holding*, which the decision at issue in this case reaffirmed, the Federal Circuit concluded that it was free to disregard this Court's definitive construction of Section 1400(b) based on a 1988 congressional amendment not to Section 1400(b) itself, but to Section 1391(c). In 1988, Congress changed the prefatory language of Section 1391(c) to alter the ambit of the statutory definition of "residenc[y]" from "for venue purposes" to "[f]or purposes of venue under this chapter." *VE Holding*, 917 F.2d at 1578-1579. That change, the Federal Circuit panel thought, sufficed to incorporate the broader default standard for venue over corporate defendants into Section 1400(b)—despite this Court's definitive judgment in *Fourco* that similar language in the earlier version of Section 1391(c) *did not* override the narrower patent-specific venue standard.

There is scant evidence that Congress intended the sweeping change the Federal Circuit ascribed to the 1988 amendment, and considerable evidence it did not. But in any case, Congress repealed the "under this chapter" language in 2011; today, Section 1391(c) uses substantially the same language as existed when the *Fourco* Court construed the statute ("for all venue purposes"). Thus, the very language on which the

Federal Circuit relied to supplant this Court's definitive construction of Section 1400(b) has now been excised from the U.S. Code.

Had the Federal Circuit paid greater heed to principles of stare decisis and the presumption against legislative repeals by implication—principles that maintain stability and predictability in the legal system and preserve the separation of powers—it would not have felt itself at liberty to set aside the *Fourco* Court's definitive construction of Section 1400(b). After *Fourco*, there was no ambiguity about the scope of venue in patent cases. And the evidence of legislative intent that the Federal Circuit relied upon in *VE Holding* to justify its departure from *Fourco* falls far short of the level of clarity needed to assume that Congress impliedly repealed or amended a definitive construction by this Court. To allow the Federal Circuit's erroneous decision to continue to govern patent venue going forward would unacceptably sacrifice the values that these bedrock jurisprudential principles exist to protect.

II. Sound policy reasons support *Fourco*'s definitive construction of the scope of the patent venue statute. Restoring that construction will benefit the patent system generally and the litigation of infringement disputes specifically.

Returning to a narrower venue rule for patent cases will revitalize the federal district courts' diminished capacity to review in detail the Patent and Trademark Office's patentability judgments, which are necessarily cursory in light of the volume of patent applications considered each year. Empirical study confirms that patent litigation has become markedly concentrated in

a few district courts since venue choice was liberalized by *VE Holding*. Studies also show that this concentration is no accident. Following the Federal Circuit's retreat from *Fourco*, the plaintiffs' bar undertook a strategic forum-shopping campaign to consolidate most patent litigation in a small handful of districts. With a single-digit percentage of the country's district judges hearing the majority of the nation's patent cases, the exigencies of docket management have led to truncated pre-trial motion practice, abridged jury trials, and a less meaningful opportunity for defendants to be heard. The result has been to vitiate the district courts' traditional role in ensuring that only worthy patents are afforded the benefit of legal monopoly—and, for defendants, less predictable results and pressure to settle non-meritorious cases outside of court.

Reversing the modern tendency toward venue concentration will have the salutary effect of spreading the volume of patent cases more evenly across the district courts. This would benefit the patent system by rationally locating disputes where specific defendants can reasonably expect to be haled into court, making patent litigation less disruptive to the conduct of normal business. And it would benefit the development of patent law by allowing a more diverse group of judges to hear and decide patent cases.

A narrow venue rule for infringement litigation is also justified by the particular characteristics of patent cases. The patent venue statute reflects the technical and document-intensive nature of patent litigation, as well as the fact that discovery burdens in patent litigation are systematically asymmetrical in favor of plaintiffs, particularly the non-practicing-entity plaintiffs who commonly assert purchased patents with few or

no records regarding the disputed technology's development, commercialization, and licensing, and who typically lack significant business activities or employees. These characteristics of patent cases justify a narrowed venue on grounds of practicality, convenience, and efficiency. Requiring both acts of infringement and a regular and established place of business as preconditions for venue in a particular district makes it more likely that that suit will be brought near where the defendant keeps its (often voluminous) business records and where its (often numerous) fact witnesses are likeliest to live and work.

For all of these reasons, the Federal Circuit should be reversed and this Court's definitive construction of Section 1400(b) should be restored to its rightful place.

ARGUMENT

I. THE COURT'S LONGSTANDING AND CONSISTENT UNDERSTANDING OF THE TEXT AND HISTORY OF THE SPECIAL PATENT VENUE STATUTE SHOULD BE RESTORED

A. This Court Has Correctly Held That the Special Patent Venue Statute Is Independent of the General Venue Statute

Throughout the long history of the patent venue statute, this Court has uniformly held that it is the exclusive provision for determining venue in infringement actions. Amid a series of statutory modifications and responses from this Court that culminated in the decision in *Fourco*, this Court has consistently main-

tained that the patent venue statute is independent of the general venue statute, and prescribes a separate, narrower venue rule for patent cases. This is (and has always been) the correct reading of these provisions.

In 1897, Congress passed a special venue statute for patent litigation as an exception to the then-prevailing general rule that venue was proper "wherever the defendant could be found" and served with process. *Stonite*, 315 U.S. at 563. The new statute provided that patent suits could be brought "in the district of which the defendant is an inhabitant, or in any district in which the defendant * * * shall have committed acts of infringement and have a regular and established place of business." Act of Mar. 3, 1897, ch. 395, 29 Stat. 695. When Congress enacted this language, it was well settled that a corporation was an "inhabitant" only of its state of incorporation. See *Shaw* v. *Quincy Mining Co.*, 145 U.S. 444, 449 (1892).

Fourteen years later, the patent venue statute was reenacted unchanged at Section 48 of the Judicial Code. See Act of Mar. 3, 1911, ch. 231, sec. 48, 36 Stat. 1100. At that time, Sections 51 and 52 of the Judicial Code provided general venue rules for federal cases: Section 51 authorized venue only in the judicial district where the defendant was an "inhabitant," and Section 52 permitted suits against two or more defendants residing in different judicial districts within the same state to be brought in either district. See 28 U.S.C. 112-113 (1940).

In *Stonite*, this Court held that the patent venue statute was the "exclusive provision controlling venue in patent infringement proceedings," and was not supplemented or otherwise affected by the general venue

rules in Section 51 and 52. 315 U.S. at 561-563; see also *id.* at 567 ("Section 48 is wholly independent of Section 51[.]").

Congress recodified Section 48 as Section 1400(b) in 1948. Recodification left the patent venue statute's structure unaltered but substituted the language "where the defendant resides" for "of which the defendant is an inhabitant." *Fourco*, 353 U.S. at 226. Congress simultaneously adopted a revised general venue statute at Section 1391(c) that purported to define a corporation's residence for "venue purposes" as any district where the corporation was licensed to do business or was doing business. The courts of appeals subsequently divided on the question whether Section 1400(b) alone controlled venue in patent infringement cases, or whether the broadened definition of residence in Section 1391(c) was to be read into Section 1400(b). *Id.* at 223-224 & n.3.

In *Fourco*, this Court resolved the disagreement, holding that Section 1400(b) is "the sole and exclusive provision controlling venue in patent infringement actions." 353 U.S. at 229. In so doing, the Court reaffirmed its earlier holding in *Stonite* that Congress did not intend Section 1400(b) "to dovetail with the general provisions relating to the venue of civil suits." *Id.* at 225.

Petitioner T.C. Heartland LLC has set forth in convincing detail the reasons why this Court's interpretation of Section 1400(b) in *Fourco* was sound. See Petitioner Br. 21-31. In addition to the other indicia of statutory meaning, the Court in *Fourco* relied heavily on the canon of statutory construction that "[s]pecific terms prevail over the general in the same or another

statute which otherwise might be controlling." 353 U.S. at 228-229 (quoting *Ginsberg & Sons* v. *Popkin*, 285 U.S. 204, 208 (1932)). The Court observed that "§ 1391(c) is a general corporation venue statute, whereas § 1400(b) is a special venue statute applicable, specifically, to all defendants in a particular type of actions, i.e., patent infringement actions." *Id.* at 228. Applying the canon, *Fourco* held that "'[h]owever inclusive may be the general language of a statute, it 'will not be held to apply to a matter specifically dealt with in another part of the same enactment." 353 U.S. at 228-229 (quoting *Ginsberg & Sons*, 285 U.S. at 208).

In the decades since, this Court has repeatedly approved and applied *Fourco*'s holding. See, *e.g.*, *Brunette Mach. Works, Ltd* v. *Kockum Indus., Inc.*, 406 U.S. 706, 713 (1972) (concluding, following an independent historical review, that "in 1897 Congress placed patent infringement cases in a class by themselves, outside the scope of general venue legislation"); see also *Atlantic Marine Constr. Co.* v. *U.S. Dist. Court for W. Dist. of Tex.*, 134 S. Ct. 568, 577 n.2 (2013); *Schnell*, 365 U.S. at 262.

When the Federal Circuit took up the issue in 1990 in *VE Holding*, it concluded that amendments to Section 1391(c) enacted in 1988 overrode this Court's definitive construction of Section 1400(b) in *Fourco*. 917 F.2d at 1579-1580. In 1988, Congress amended the general venue statute to add the introductory phrase: "For purposes of venue under this chapter * * *." *Id.* at 1579. The *VE Holding* court described this new prefatory text as "exact and classic language of incorporation" that changed the relationship between Section 1391(c) and Section 1400(b). But the Federal Circuit's reasoning is unpersuasive.

The Federal Circuit determined that the amended Section 1391(c) "only operates to define a term in § 1400(b)," and so it did not create the conflict between the general and the specific that was at the core of this Court's holding in *Fourco*. 917 F.2d at 1580. But that was precisely the reasoning of the Second Circuit opinion this Court reversed in *Fourco*. The Second Circuit had held that, following the 1948 amendments to the Judicial Code, Section 1391(c) supplied "the definition of corporate residence" for purposes of patent venue, "just as that definition is properly to be incorporated into other sections of the venue chapter." *Transmirra Prods. Corp.* v. *Fourco Glass Co.*, 233 F.2d 885, 886 (2d Cir. 1956). After scrutinizing the statutory text and the relevant legislative history, this Court in *Fourco* concluded that the statutes could not be harmonized as the Second Circuit—and now the Federal Circuit—read them because Congress had ascribed a specific meaning to "resides" in Section 1400(b) that was narrower than the general definition it adopted in Section 1391(c). In this crucial respect, there simply is no material difference between the statutory provisions this Court definitively construed in *Fourco* and the provisions the Federal Circuit construed in *VE Holding*.

In all events, whatever hypothetical merit the Federal Circuit's approach might have previously held has been extinguished by subsequent congressional enactment. In 2011, Congress amended Section 1391(c) again. It removed the language it added in 1988 (on which the Federal Circuit relied) and replaced it with new language ("for all venue purposes") that mirrors the text of Section 1391(c) that the Court considered in *Fourco* ("for venue purposes").

Section 1400(b) has not been amended.[2] It currently contains the same "resides" language that the Court definitively construed in *Fourco*. Consequently, as is plain from both the text of Section 1400(b) and the legislative history discussed in *Fourco*, Section 1391(c) cannot be read to define "resides" for purposes of the patent venue statute without irresolvable conflict.

Simply put, *Fourco* was correct when it was decided and remains correct today.

B. All Indicia of Statutory Meaning Show That Congress Narrowed Patent Venue in 1897 and Has Never Expressed an Intent to Expand It

This Court has had several occasions to review the legislative history of the patent venue statute. Each time, it has concluded that Congress adopted a special statute for patent cases to narrow venue in infringement cases. *E.g.*, *Pure Oil Co.* v. *Suarez*, 384 U.S. 202, 207 (1966) ("The patent infringement venue statute was enacted in 1897 specifically to narrow venue in such suits.") (citation omitted); *Stonite*, 315 U.S. at 564-565 (explaining that the Act of 1897 was adopted

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[2] Congress has repeatedly considered revising or repealing Section 1400(b) but has never done so. Between 1965 and 1991, the Patent, Trademark and Copyright Section of the American Bar Association proposed no fewer than six resolutions addressing Section 1400(b). In 1975, the Section proposed amending Section 1400(b) to provide that Section 1391(c)'s definition of "residence of a corporation" be used as the definition of "resides" under Section 1400(b)—exactly the change respondents urge that Congress effected *without* amending Section 1400(b). See William Johnson, *The New Rule for Patent Venue for Corporate Defendants: Kansas Was Never Like This*, 11 Pace L. Rev. 667, 686 & n.139 (1991).

to "define the exact jurisdiction of the federal courts in actions to enforce patent rights" in light of "abuses engendered by [the] extensive venue" law of the Judiciary Act of 1789). *Fourco* endorsed this consistent reading of the patent venue statute. It explained that the Court in *Stonite* "review[ed] the history of, and reasons and purposes for, the adoption by Congress of the venue statute applying specifically to patent infringement suits," and it declared that this history was "ground wholly unnecessary to replow here." 353 U.S. 225. At no point since has this Court questioned that the intent of the special patent venue statute was to narrow venue in infringement cases.

Indeed, it is clear that Congress's original intent was to limit the scope of venue in patent infringement cases. Before 1897, patent venue was proper at either the place of the defendant's inhabitance or where "found" for service. See Judiciary Act of Sept. 24, 1789, ch. 20, sec. 11, 1 Stat. 79; see also *Marvel*, 287 U.S. at 434-435. Congress amended the Judiciary Act in 1887 and 1888 to restrict venue in suits against corporate defendants, but this Court held that the general venue provisions of the amendments did not apply to patent infringement litigation. See *In re Keasbey & Mattison Co.*, 160 U.S. 221, 230 (1895); see also *In re Hohorst*, 150 U.S. 653 (1893). Congress acted swiftly after *Keasbey*—not by clarifying that the narrowed general venue rules applied to patent cases, as it could have done, but by instead adopting the "predecessor to § 1400(b) as a special venue statute in patent infringement actions to eliminate the 'abuses engendered' by previous venue provisions allowing such suits to be brought in any district in which the defendant could be served." *Schnell*, 365 U.S. at 262.

The legislative record confirms that Congress acted both to narrow patent venue and to define its contours precisely: Representative Mitchell of New York, who reported the 1987 Act as H.R. 10202 and led the floor discussion on the bill, remarked that it "tend[ed] not only to define the jurisdiction of the circuit courts not now defined, but also limit that jurisdiction." 29 Cong. Rec. 1900 (1897). Representative Lacey of Iowa agreed, explaining that the main purpose of the bill was to restrict venue to those districts "where a permanent agency transacting the business is located, and that business is engaged in the infringement," adding that "[i]solated cases of infringement would not confer this jurisdiction." *Ibid.*; see also Neal A. Waldrop, *The Patent Venue Statute, 28 U.S.C. 1400(b) Should Not Be Repeated*, 4 A.P.L.A. Q.J. 32, 36 (1976).

Given this history and this Court's repeated recognition that Congress intended to narrow venue by enacting the special patent venue statute, the question is whether anything after *Stonite* and *Fourco* indicates a clear intent on Congress's part to change course. The legislative record of the 1988 and 2011 amendments is bereft of *any* evidence that Congress intended to reverse its century-old policy of placing patent litigation in a class by itself for venue purposes. What little evidence exists suggests Congress did *not* intend a substantial change. Consider the following:

1. The House and Senate Reports accompanying the 1988 Act[3] did not describe the amendments as effectuating a fundamental transformation of the scope of the patent venue statute. To the contrary, they

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[3] The Judicial Improvements and Access to Justice Act of 1988, Pub. L. No. 100-702, § 1013, 102 Stat. 4669.

characterized the emendation to Section 1391(c) as one of a series of "miscellaneous provisions dealing with relatively minor proposals," with the House version calling them "relatively minor discrete proposals." See H.R. Rep. No. 889, 100th Cong., 2d Sess. 66 (1988); 134 Cong. Rec. 31061 (1988).

2. The legislative history of the 1988 Act made no mention of Section 1400(b). Instead, the House and Senate Reports explained that the change to Section 1391(c) was intended to ameliorate the problem of corporations being exposed to venue in more than one district in a multi-district state under a literal reading of the pre-amendment general venue statute. See H.R. Rep. No. 889, at 70. If anything, this implies Congress intended the change modestly to *limit* venue, a purpose flatly inconsistent with an implied repeal of Section 1400(b)'s exclusivity.

3. The legislative history of the 1988 amendment to Section 1391(c) states that the amendment was proposed by the "Judicial Conference"—that is, the Judicial Conference Subcommittee on Federal Jurisdiction to the Committee on Court Administration. See 134 Cong. Rec. at 31061. More specifically, the proposal originated from a 1985 memorandum by Judge William W. Schwarzer of the Northern District of California to the members of the Judicial Conference. See 39 Pat. Trademark & Copyright J. (BNA) No. 974, at 426 (1990). Judge Schwarzer himself maintained that his proposal had a narrow purpose and "was not intended to overrule any special venue statute," *ibid.*, a position consistent with the House and Senate Reports' characterization of the change as "relatively minor."

4. The House Report accompanying the 2011 Act,[4] H.R. Rep. No. 10, 112th Cong., 1st Sess. 20 (2011), stated that the sole purpose of the amendment to Section 1391(c) was to apply Section 1391(c) to "venue provisions that appear elsewhere in the United States Code," rather than "only for purposes of venue under Chapter 87." *Fourco* established that the definition of "reside" in the patent venue statute was distinct from, and did not "dovetail" with, the definition supplied by Section 1391(c). Congress's 2011 decision to extend Section 1391(c)'s reach beyond Chapter 87 is immaterial to whether Congress ever intended to abrogate *Fourco* by consolidating the definitions used in the general and patent venue statutes—a point the decision below misapprehended when it concluded that the 2011 amendments constituted "a broadening of the applicability of the definition of corporate residence." Pet. App. 5a.

The lack of any evidence of subsequent congressional intent to expand venue in patent cases only reinforces the soundness of *Fourco*'s holding. "Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment." *Morton* v. *Mancari*, 417 U.S. 535, 550-551 (1974). Congress has never expressed an intention—let alone a clear one—to override *Fourco*'s conclusion that Section 1400(b) is entirely independent of Section 1391(c).

C. The Federal Circuit's Approach to the Patent Venue Statute Shows Insufficient Respect for Principles of

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[4] The Federal Courts Jurisdiction and Venue Clarification Act of 2011, Pub. L. No. 112-63, § 202, 125 Stat. 758, 763-764.

Statutory Interpretation That Are Essential to the Stability of the Legal System

The Federal Circuit's patent venue decisions fail to afford the proper respect to this Court's definitive construction of Section 1400(b) in *Fourco*. In departing from *Fourco*'s long-established holding, the Federal Circuit gave short shrift to the "central importance of stare decisis in this Court's jurisprudence." *Hilton* v. *S. Carolina Pub. Rys. Comm'n*, 502 U.S. 197, 201 (1991). "Adherence to precedent promotes stability, predictability, and respect for judicial authority." *Id.* at 202. For these reasons, this Court does not "depart from the doctrine of stare decisis without some compelling justification." *Ibid.*

Stare decisis has "special force" in respect to statutory interpretation, because "Congress remains free to alter" the statute being construed. *John R. Sand & Gravel Co.* v. *United States*, 552 U.S. 130, 139 (2008) (internal quotation marks omitted). As a result, "[a]ll" of this Court's "interpretive decisions, in whatever way reasoned, effectively become part of the statutory scheme." *Kimble* v. *Marvel Entm't, LLC*, 135 S. Ct. 2401, 2409 (2015). Precisely because settled constructions are presumed to be fixed, a statute's "longstanding meaning forms the background against which Congress legislates when it amends the law." *Firstar Bank, N.A.* v. *Faul*, 253 F.3d 982, 988 (7th Cir. 2001) (citing *Cottage Sav. Ass'n* v. *Comm'r*, 499 U.S. 554, 562 (1991)). When "judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate" that

meaning. *Bragdon* v. *Abbott*, 524 U.S. 624, 645 (1998). In this way, stare decisis both stabilizes statutory law and gives faithful effect to congressional design. *Ibid.*

These principles, and the values they advance, should apply with particular force when (as in this case) a court considers whether a subsequent legislative enactment has impliedly repealed a statutory provision whose meaning has been fixed by judicial interpretation. Like the doctrine of stare decisis, the canon that repeals by implication are disfavored ensures stability and predictability in the law and preserves the separation of powers.[5] This Court's definitive construction of the pre-existing provision must be the baseline for assessing whether a subsequent amendment has repealed or otherwise altered the provision. Only the clearest indications of congressional intent should suffice to justify departing from that construction.

A leading treatise synthesizes these principles:

> A clear, authoritative judicial holding on the meaning of a particular provision should not be cast in doubt and subjected to challenge whenever a related though not utterly inconsistent provision is adopted in the same statute or even in an affiliated statute. Legislative revision of law clearly established by judicial opinion ought to be by express language or by unavoidably implied contradiction.

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[5] The doctrine applies as much to implied amendments as it does to repeals. "Every amendment of a statute effects a partial repeal to the extent that the new statutory command displaces earlier, inconsistent commands, and * * * implied amendments are no more favored than implied repeals." *National Ass'n of Home Builders* v. *Def. of Wildlife*, 551 U.S. 644, 664 n.8 (2007).

Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 331 (2012).

In putting aside this Court's definitive construction of Section 1400(b) in *Fourco*, the Federal Circuit did not identify anything remotely approaching "express language" or "unavoidably implied contradiction" to support its conclusion that the 1988 amendments to Section 1391(c) impliedly worked a fundamental transformation in the scope of the patent venue statute. The Federal Circuit accorded enormous weight to Congress's decision to change the ambit of the default definition of corporate residency from "for venue purposes" to "[f]or purposes of venue under this chapter." *VE Holding*, 917 F.2d at 1579-1580. But, as explained above (see *supra* pp. 11-12), that ambiguous shift in introductory language falls far short of the clear evidence of congressional intent needed to support an implied repeal of Section 1400(b) as definitively construed by this Court. And the legislative history (which made no mention of Section 1400(b)) described the changes made by the 1988 amendments to Section 1391(c) as minor and discrete (see *supra* pp. 15-16).

Equally to the point, whatever merit the Federal Circuit's reading might once have held, the 2011 amendments to Section 1391(c) eviscerated the basis for the court's finding of an implied repeal because it eliminated the "under this chapter" language on which that finding rested. At this point, the only substantive difference between the version of Section 1391(c) that *Fourco* construed and the version that exists today is that "for all venue purposes" has replaced "for venue purposes" and been moved to the beginning of the statute. The two phrases are functionally identical—in fact, they are so similar that it can reasonably be as-

sumed that by restoring the phrase "for * * * venue purposes" to the text of the statute Congress intended to incorporate the meaning that *Fourco* ascribed to the statute. See *Bragdon*, 524 U.S. at 645.

The 2011 amendments also narrowed Section 1391's general applicability by providing that it governs the venue of all civil actions "[e]xcept as otherwise provided by law." 28 U.S.C. 1391(a). Some statutes "otherwise provide[]" a special venue distinct from Section 1391's more general rules. See, *e.g.*, *Lumiere* v. *Mae Edna Wilder, Inc.*, 261 U.S. 174, 176 (1923) ("The venue of suits for infringement of copyright is not determined by the general provision governing suits in the federal district courts."). Of course, *Fourco* held that Section 1400(b) is such a statute.

After the 2011 amendments, nothing remains of the Federal Circuit's rationale for overturning this Court's definitive construction of the patent venue statute in *Fourco*. Indeed, in this very case, the Federal Circuit was forced to defend its decision to adhere to *VE Holding* on the theory that Congress could have but did not expressly change it when Congress amended the venue statute in 2011. In other words, the Federal Circuit gave its own ruling in *VE Holding* precisely the authoritative status that the Circuit denied to this Court's construction of Section 1400(b) in *Fourco*. A proper respect for stare decisis and the canon disfavoring repeals by implication, and for the jurisprudential values those doctrines advance, would have avoided the difficulties that the Federal Circuit's approach has produced.

II. RESTORING THIS COURT'S CONSTRUCTION OF THE PATENT VENUE STATUTE WILL STRENGTHEN THE PATENT SYSTEM AND ADVANCE CONGRESS'S STATUTORY GOALS

It should come as no surprise that Congress has never countermanded *Fourco's* interpretation of Section 1400(b). That interpretation reflects sound policies that promote both the stability of the patent system as a whole and the fair and efficient adjudication of infringement disputes.

The Federal Circuit's contrary reading of Section 1400(b) directly undermines these policies. Congress constructed a patent system that depends on a narrow venue rule to function effectively. By design, federal district courts provide a check on the Patent and Trademark Office's (PTO) decisions to grant patents. That check is especially necessary today because the PTO can barely keep up with its ever-growing workload. But the systematic forum-shopping made possible by *VE Holding* has concentrated a significant majority of patent litigation in a small handful of district courts before an even smaller handful of federal judges. As a result, an overwhelmed judiciary cannot effectively superintend an overburdened PTO. In addition, *VE Holding* has deprived the courts of a diversity of views on patent law, which is crucial in a system in which Congress has concentrated patent appeals in a single court. And the Federal Circuit's erroneous decisions have exposed businesses to costly infringement lawsuits by forcing them to defend themselves far from where they are located and where relevant witnesses are found. Restoring *Fourco*'s settled interpretation of

Section 1400(b) will bring an end to these adverse consequences and advance the many sensible policies that undergird the special patent venue provision.

A. The Patent Venue Standard Established in *Fourco* Promotes Effective Judicial Review of Patents

Our patent system assigns a vital role to the federal courts to ensure that patents remain within their proper bounds. That system achieves balance through a "carefully crafted bargain": it rewards inventors with exclusive monopolies, but only to "encourage[] both the creation and the public disclosure of new and useful advances in technologies." *Pfaff* v. *Wells Elecs., Inc.*, 525 U.S. 55, 63 (1998). Sound patents "promote the progress of science and the useful arts" and compensate inventors for their "labor, toil, and expense in making the inventions." *Seymour* v. *Osbourne*, 78 U.S. 516, 533 (1870). But unsound patents—those that are overbroad, ambiguous, unoriginal, or otherwise improvidently granted—"stifle competition without any concomitant advance in the 'Progress of Science and useful Arts.'" *Bonito Boats, Inc.* v. *Thunder Craft Boats, Inc.*, 489 U.S. 141, 146 (1989) (quoting U.S. Const. Art. I, § 8, cl. 8).

Because the PTO has an overwhelming caseload, most patent applications receive only a cursory review before they are approved; patent examiners spend just eighteen hours reviewing the average application, including time spent searching for prior art. See Mark A. Lemley, *Rational Ignorance at the Patent Office*, 95 Nw. U. L. Rev. 1495, 1497, 1500 (2001). For these reasons, patent issuance is fraught with error: re-

search suggests that half of the patents that are litigated to judgment are deemed invalid. *Id.* at 1496 n.4.

By subjecting certain patents to a second layer of exacting scrutiny, patent litigation preserves the system's balance. Robust judicial review serves as a necessary check on the PTO's power to award private monopolies.

Before the Federal Circuit expanded patent venue in *VE Holding*, the burden of judicial review of patents was distributed relatively evenly among more than 600 federal district judges nationwide. See Saurabh Vishnubhakat, *Reconceiving the Patent Rocket Docket: An Empirical Study of Infringement Litigation 1985-2010*, 11 J. Marshall Rev. of Intell. Prop. L. 58, 79 (2011). But *VE Holding* has radically redistributed patent litigation. In the last two years alone, 75 percent of patent case filings were concentrated in just nine judicial districts, with the Eastern District of Texas and the District of Delaware together comprising 48.9 percent of all cases.[6] Brian J. Love & James Yoon, *Predictably Expensive: A Critical Look at Patent Litigation in the Eastern District of Texas*, 20 Stan. Tech. L. Rev. 1, 8 (2017). A single judge in the Eastern District of Texas was assigned approximately one-quarter of all patent cases filed nationwide in the same time period, in large measure because the local rules in that district enable patent plaintiffs to elect to have their cases

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[6] Compounding the problem, patent litigation has multiplied in the same period venue has become concentrated. Patent case filings quintupled between 1991 and 2015. PriceWaterhouseCoopers, 2016 Patent Litigation Study 1 (2016), https://www.pwc.com/us/en/forensic-services/publications/assets/2016-pwc-patent-litigation-study.pdf.

heard by that judge. *Id.* at 6. Two districts in Delaware and Texas have heard 48.9 percent of the nation's patent cases in the last two years, but they of course do not enjoy 48.9 percent of the judicial resources allocated to patent cases, leaving judges in these districts overstretched despite their tremendous exertions.

This extraordinary concentration of patent cases results from a deliberate strategy on the part of the plaintiffs' bar, made possible by the unique characteristics of patent rights. Because intellectual property rights derive from the Constitution, the patent grant has a national scope. See U.S. Const. Art. I, § 8, cl. 8; *Mikohn Gaming Corp.* v. *Acres Gaming, Inc.*, 165 F.3d 891, 896 (Fed. Cir. 1998). And precisely because patent rights are national in scope, an infringing product creates liabilities everywhere it goes, without regard to the patent owner's connection to the forum. See *Beverly Hills Fan Co.* v. *Royal Sovereign Corp.*, 21 F.3d 1558, 1571 (Fed. Cir. 1994). That reality imposes particularly stark consequences on companies like Intel and Dell, which sell a wide array of products in virtually every judicial district in the country.

For these reasons, under an expansive rule that makes venue coextensive with jurisdiction, it was assured that patent owners would come to select venue based on factors that have nothing to do with convenience to either party or the forum's connection to the injury. *Stonite* cited examples of such strategic behavior dating as far back as the 1890s. In *Bicycle Stepladder Co.* v. *Gordon*, 57 F. 529, 529-530 (Cir. Ct. N.D. Ill. 1893), an Iowa plaintiff sued a Kentucky-based ladder manufacturer in the Northern District of Illinois, taking advantage of the fact that the ladder-seller had come to Chicago to visit the World's Columbian

Exposition and had taken a single order from a Chicago resident.

The opportunities for abuse are far stronger today following *VE Holding*. Empirical evidence suggests that venue selection is highly sensitive to factors affecting litigation strategy, such as a district court adopting rules favorable to patent plaintiffs. See Vishnubhakat, 11 J. Marshall Rev. of Intell. Prop. L. at 64 (finding that the number of patent cases filed in the Eastern District of Texas increase eightfold following the district's adoption in 2005 of specialized patent rules). This case provides a good example. The parties to this litigation are Midwestern food and beverage companies—TC Heartland is based in Indiana, and Kraft in Illinois. Less than two percent of TC Heartland's sales of its allegedly infringing "liquid water enhancer[s]" made their way into Delaware. See *Kraft Foods Grp. Brands LLC* v. *TC Heartland, LLC*, No. 14-28-LPS, 2015 WL 4778828, at *1 (D. Del. Aug. 13, 2015). Whatever Kraft's reasons for selecting the venue that it did, it likely was not because Kraft felt the infringement injury more keenly in Delaware than elsewhere. Stratagems of this sort are made possible by the national scope of modern jurisdictional rules and an integrated economy in which almost any patented product can be shipped into any district in the nation. See Kimberly A. Moore, *Forum Shopping in Patent Cases: Does Geographic Choice Affect Innovation?*, 79 N.C. L. Rev. 889 (2001).

The combination of broad venue rules following the Federal Circuit's wrong turn in *VE Holding* and intentional strategies to take advantage of those rules has had predictable but unfortunate consequences for the judiciary's ability to serve as an effective check in the

patent system. Districts inundated with a disproportionate number of patent cases have been forced to adapt to skyrocketing caseloads by limiting their review of patents or curtailing pretrial motion practice and other procedural protections. This is manifestly inconsistent with the multi-layered review system that Congress devised.

Several standing orders adopted by judges in the Eastern District of Texas illustrate this compulsion to pare back judicial review when dockets are unmanageably large. In 2014, a standing order for patent cases in one branch of the district was adopted to "increase the efficiency of cases" in light of the "large number of pending cases on the Court's docket" and the concomitant "voluminous pretrial motion practice." See Standing Order Regarding Letter Briefs, Motions in Limine, Exhibits, Deposition Designations, and Witness Lists at 1 (E.D. Tex. Apr. 23, 2014), www.txed.uscourts.gov/cgi-bin/view_document.cgi?document=24456. The order required patent defendants to submit a letter brief seeking permission from the court before filing any summary judgment motion, motion to strike, or *Daubert* motion.

Another standing order sought to expedite patent cases by requiring leave of court, upon a showing of good cause, before a defendant could bring an early "*Alice* motion" challenging patent validity. See Standing Order Regarding Motions Under 35 U.S.C. § 101 (E.D. Tex. Nov. 10, 2015), http://www.txed.uscourts.gov/cgi-bin/view_document.cgi?document=25257.

Overburdened courts have also responded by shortening trials to a bare minimum. Large verdicts in cases involving complex patents have been rendered

following five-day trials. One pharmaceutical defendant in an infringement suit regarding antibodies used to combat cancer-tumor necrosis was given just two-and-a-half days to present its case in chief on invalidity, infringement, damages, and other issues; the jury then reached a verdict of infringement and awarded more than $1.67 billion of damages. See Timothy J. Malloy et al., *1 Size Doesn't Fit All in Patent Trials*, Law360 (Oct. 28, 2010), https://www.law360.com/ip/articles/203660 (discussing *Centocor Ortho Biotech Inc.* v. *Abbott Laboratories*); see also *Centocor Ortho Biotech* v. *Abbott Labs.*, 636 F.3d 1341 (Fed. Cir. 2011) (reversing the verdict).

The contrast with infringement trials in districts not overburdened with patent suits is striking. See, *e.g.*, *Microsoft Corp.* v. *Motorola, Inc.*, No. C10-1823JLR, 2013 WL 2111217, at *1 (W.D. Wash. Apr. 25, 2013) (resolving reasonable and non-discriminatory license terms issues in a 207-page order following a week-long bench trial dedicated solely to patent damages issues); see also Memorandum Opinion, Findings, Conclusions, and Order, *In re Innovatio IP Ventures, LLC*, No. 11-cv-09308 (N.D. Ill. Oct. 3, 2013), ECF No. 975 (deciding the narrow issue of a reasonable and non-discriminatory licensing rate in an 89-page order following a six-day bench trial also solely on damages).

Making matters worse, onerous patent dockets—and the resource-management strategies judges adopt to relieve the pressure—predictably yield higher rates of legal error. Research shows that the most popular forums with patent plaintiffs are also those that are most likely to be reversed by the Federal Circuit. See Teresa Lii, *Shopping for Reversals: How Accuracy Differs Across Patent Litigation Forums*, 12 Chi.-Kent

J. Intell. Prop. 31 (2013). And that is when patents get a hearing at all: the same entities and attorneys responsible for concentrating patent litigation in a handful of districts have perfected the art of extracting quick settlements from defendants who fear the very circumscribed procedural protections and expedited discovery schedules that overconcentration has produced. See Love & Yoon, 20 Stan. Tech. L. Rev. at 14, 23-26 (calculating that the settlement rate in the Eastern District of Texas is 87.5 percent, compared to 71.8 percent for all other districts).

The patent venue statute, as Congress intended it and *Fourco* correctly construed it, maintained the equilibrium of the patent system by allocating the second-level review function roughly evenly across all federal districts. The best available evidence suggests that reversing the Federal Circuit's erroneous interpretation of Section 1400(b) would in relatively short order rectify the unhealthy imbalance that *VE Holding* caused. A recent study concludes that the "distribution of cases would be decidedly less concentrated" if *VE Holding* were reversed, with the District of Delaware becoming the most popular district but hosting just half the share of patent cases as the most popular district today, the Eastern District of Texas. Colleen V. Chien & Michael Risch *Recalibrating Patent Venue* 36 (Oct. 6, 2016), Santa Clara Univ. Legal Studies Research Paper No. 10-1, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2834130.[7] Removing the

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[7] The District of Delaware's rising share of patent cases under a narrowed venue rule would be a byproduct of the state's popularity as a place of incorporation rather than forum shopping. Corporations choose where they incorporate. If the cost

distortive effect of the Federal Circuit's *VE Holding* decision will reinvigorate the judiciary's ability to carry out its vital function of policing patent validity.

B. The Patent Venue Standard Established in *Fourco* Allows Patent-Law Issues To Percolate More Widely Among Lower Courts

Reversing venue concentration in patent litigation will also promote the sound development of patent law more generally. By distributing cases among more courts and judges, a narrow patent venue standard promotes a diversity of judgments, opinions, and practices about how best to resolve patent cases. More judges will have an opportunity to weigh in on challenging questions of patent law, thus allowing the legal system as a whole to benefit from greater inter-court dialogue—a virtue all the more important given Congress's decision to consolidate all appellate decisionmaking in patent cases in a single court of appeals. In contrast, a venue rule under which the vast preponderance of patent cases cluster in a handful of judicial districts sacrifices the benefits of percolation, misallocates the resources of the whole judiciary, and threatens to ossify the development of patent law. The data indicate this is precisely what has followed from the Federal Circuit's ruling in *VE Holding*. Moore, 79 N.C. L. Rev. at 903-907.

A signal virtue of a court system that allocates authority horizontally across multiple lower courts is that

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of doing so becomes intolerable in Delaware because patent law and procedures evolve in a way that is systemically unfair to corporate defendants, they can choose to incorporate elsewhere, which would further diversify venue selection.

they may experiment with different approaches to common legal questions. An appellate court tasked with setting a nationally binding rule can draw on that experimentation. This Court has long cited the benefits of this deliberative process as a reason for denying certiorari. *E.g.*, *Maryland* v. *Balt. Radio Show*, 338 U.S. 912, 918 (1950) ("A case may raise an important question but the record may be cloudy. It may be desirable to have different aspects of an issue further illuminated by the lower courts. Wise adjudication has its own time for ripening."); see also Samuel Estreicher & John Sexton, *A Managerial Theory of the Supreme Court's Responsibilities: An Empirical Study*, 59 N.Y.U. L. Rev. 681, 716 (1984) ("Disagreement in the lower courts facilitates percolation—the independent evaluation of a legal issue by different courts.").

This is particularly true because patent appeals are already consolidated in a single intermediate appellate court. A principal objective in establishing the Federal Circuit was to "improve the uniformity of patent decisions and stability of patent law." John B. Pegram, *Should the U.S. Court of International Trade Be Given Patent Jurisdiction Concurrent with That of the District Courts?*, 32 Hous. L. Rev. 67, 86 (1995). But the Federal Circuit's decisionmaking is improved by hearing a diversity of opinions from the lower courts before rendering a nationally binding judgment. See *Improving Federal Court Adjudication of Patent Cases, Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Property of the U.S. H.R. Judiciary Comm.*, 109th Cong. 1st Sess. 28 (2005) (statement of Professor Kimberly A. Moore) ("[H]aving only one trial court for all patent cases would eliminate the percolation that currently occurs among the various district courts.

Having numerous courts simultaneously considering similar issues permits the law to evolve and often aids in flushing out the best legal rules.").

The concentration of patent venue is a modern phenomenon. Neither the legislators who enacted the patent venue statute nor the *Fourco* Court that interpreted it could have anticipated that the law would be a bulwark against overconcentration. That it would have this effect, however, supplies an important reason why this Court ought to restore the proper interpretation of the patent venue statute.

C. The Unique Characteristics of Patent Litigation Militate in Favor of Narrower Venue

Federal venue statutes "are generalized attempts to promote the * * * goals of convenience and fairness" with respect to individual litigants. *Van Dusen* v. *Barrack*, 376 U.S. 612, 623 (1964). The convenience and practicality afforded by a narrow venue rule is particularly important in patent litigation, which requires careful attention to detailed records relating to the research, design and development of accused products. The patent venue statute reflects Congress's judgment that achieving these goals in patent-infringement cases requires a venue rule that is more protective of defendants' interests than the one that governs most other federal cases.

Decades ago, courts recognized that the patent venue statute reflected "a legislative policy recognizing the technical and intricate nature of patent litigation" because of the "obvious difficulty involved in a court attempting to ascertain from the mass of technical data presented the pertinent and determinative facts."

Bradford Novelty Co. v. *Manheim*, 156 F. Supp. 489, 491 (S.D.N.Y. 1957); accord *Ruth* v. *Eagle-Picher Co.*, 225 F.2d 572, 577 (10th Cir. 1955) ("The patent venue statute, as construed in [*Stonite*], reflected a sound policy of long standing. It was based on considerations of practicality and convenience in such litigation."); Paul J. Kozacky, *Narrow Venue Statutes and Third Party Practice: Third Party Defendants Get to Go Home*, 39 DePaul L. Rev. 389, 399 (1990) (noting that the central purpose underlying the patent venue statute was that "suit should be brought near the location where the defendant keeps his business records, which ordinarily are both voluminous and painstakingly scrutinized in patent infringement litigation."). This is fully consistent with this Court's longstanding assertion that the original patent statute was enacted to narrow venue in infringement cases. See *supra* Part I.B.

This justification for the patent venue statute is far stronger today than in 1897. Modern patent litigation is so complex and fact-intensive that the median cost of defending a moderately sized patent suit is $2.6 million, with the bulk of that expense incurred during discovery. See Letter from Sixty-One Professors to Congress in Support of Patent Reform Legislation (Nov. 25, 2013), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2359621. While other types of litigation may also be technical, document-intensive, or costly, there is empirical evidence that patent litigation is uniquely so. See, *e.g.*, Emery G. Lee III & Thomas E. Willging, Fed. Judicial Ctr., Report to the Judicial Conference Advisory Committee on Civil Rules: Litigation Costs in Civil Cases: Multivariate Analysis (2010); Am. Intellectual Prop. Law Ass'n, Report of the Eco-

nomic Survey 2013, at I-129-I-132 (2013). Congress's decision to recognize these unique hardships in the patent context remains wise policy. And it can enact similar special venue statutes if it so chooses.

The costs and burdens of infringement litigation are asymmetrically imposed on defendants. In patent infringement cases, "the bulk of the relevant evidence"—both documents and fact witnesses—"usually comes from the accused infringer." *In re Genentech, Inc.*, 566 F.3d 1338, 1345 (Fed. Cir. 2009). The asymmetry is exacerbated when the plaintiff is a non-practicing entity whose business is to own and prosecute patents rather than commercialize them, for these patent owners typically have few relevant documents or witnesses. See *Eon-Net LP* v. *Flagstar Bancorp*, 653 F.3d 1314, 1327 (Fed. Cir. 2011) (observing that the plaintiff could "impose disproportionate discovery costs on" the defendant because, unlike non-practicing entities, "accused infringers often possess enormous amounts of potentially relevant documents that are ultimately collected and produced").

In light of these qualities of patent litigation, considerations of fairness to defendants, cost-effective resolution of disputes, and courts' efficient access to evidence—particularly live testimony by competent witnesses—all favor a special, narrow venue rule in infringement cases.

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As this Court has recognized, the limited venue statute "confers upon defendants in patent cases a privilege in respect of the places in which suits may be maintained against them." *Marvel*, 287 U.S. at 435. That privilege is sensible in light of the special charac-

teristics of patent cases. Those characteristics existed in 1897, but they are even more relevant today, when effective district court review of patents serves as an indispensable check on an overloaded PTO; patent law is in need of wider doctrinal ventilation before legal questions reach the lone court of appeals that considers them; and patent litigation is particularly costly to defendants. If Congress disagrees with these policies, it is free to amend Section 1400(b) or Section 1391(c) to provide in clear terms for a broad venue rule for patent cases. But because Congress has never done that, bedrock legal principles that promote stability, continuity and predictability in the law require that *Fourco*'s correct interpretation of the special patent venue provision be reaffirmed.

CONCLUSION

The judgment of the Court of Appeals for the Federal Circuit should be reversed.

Respectfully submitted,

MATTHEW HULT
INTEL CORPORATION
2200 Mission College Blvd.
Santa Clara, California 95054
(408) 765-3749

Counsel for Amicus Curiae Intel Corporation

KRISHNENDU GUPTA
DELL INC.
176 South Street
Hopkinton, MA 01748
(508) 293-6654

Counsel for Amicus Curiae Dell Inc.

DONALD B. VERRILLI JR.
Counsel of Record
CHAD GOLDER
MUNGER, TOLLES & OLSON LLP
1155 F. Street, NW, 7th Floor
Washington, D.C. 20004
donald.verrilli@mto.com
(202) 220-1100

JORDAN D. SEGALL
MUNGER, TOLLES & OLSON LLP
355 S. Grand Ave., 35th Floor
Los Angeles, California 90071
(213) 683-9208

Counsel for Amicus Curiae Intel Corporation

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